A

PP v. MOHD YAHYA MAT SAHRI & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ABDUL RAHMAN SEBLI JCA
HARMINDAR SINGH DHALIWAL J
B [CRIMINAL APPEALS NO: B-09-258-09-2015 & B-09-187-07-2013]
4 MARCH 2016

C ***CRIMINAL LAW:*** *Penal Code – Section 471 – Element of offence – Dishonestly 'used' offending document as genuine – Whether proven – Whether only a mere suspicion – Whether prima facie case established*

D ***CRIMINAL LAW:*** *Penal Code – Section 420 – Dishonest inducement for donation – Whether dishonest intention established – Whether defence mere denial – Whether defence had effect of nullifying witness testimony – Failure by victim to make police report – Whether only affected credibility of victim – Whether accused proven to have fraudulent intention*

E F G H I The respondent was an officer with special functions to the then Menteri Besar of Selangor ('MB') and Head of Division of Parti Keadilan Rakyat ('PKR'). The first charge against the respondent under s. 420 of the Penal Code was that, he had in his capacity as the Director of Programme for Pakatan Rakyat's 100 day celebration ('100 days celebration'), by deception, induced PW14 into giving him a donation of RM50,000 which he claimed was meant for an event organised by the State Government of Selangor. The respondent solicited the donation through a letter ('P38') which was said to have been copied to the MB and an oral representation indicating that the donation was to cover the cost of organising the event. On the strength of P38 and oral representation, PW14 agreed to contribute the said sum. The sum was deposited into PKR Selangor account opened using a resolution signed by office bearers of PKR party. However, there was neither agenda nor a resolution for the opening of any bank account for PKR Selangor and hence, the offence formed the subject matter of the second charge under s. 471 of the Penal Code and punishable under s. 465 of the Penal Code. The Sessions Court acquitted the respondent of the first charge after his defence was called whilst, he was acquitted and discharged of the second charge without his defence being called. On appeal by the prosecution against both decisions, the High Court dismissed the appeal against acquittal and discharge in respect of the second charge but allowed the appeal against the acquittal in respect of the first charge, whereupon the respondent was convicted of the charge and sentenced to two years imprisonment and two strokes of the rotan. Hence, the respondent's appeal only against his conviction in respect of the first charge and the prosecution's appeal against the dismissal of their appeal in respect of the second charge.

Held (dismissing appeal against first charge and affirming conviction; dismissing appeal against second charge)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The essential element of the offence in the second charge, *ie*, that the respondent had dishonestly 'used' the offending document as genuine, had not been proven by the prosecution. There was no evidence that the respondent was the person who used the offending document in the commission of the offence. At its highest, the prosecution's case was a mere suspicion. Suspicion, no matter how grave, is no substitute for proof. Hence, there was no *prima facie* case established against the respondent. The prosecution's appeal against the respondent's acquittal against the second charge was dismissed. (paras 7 & 8)

(2) Although there was no evidence to link the respondent directly with the opening of the account, there was no doubt that he was involved. The respondent certainly knew of the existence of the account as he had gone to the bank together with two other PKR members for that purpose. The respondent's dishonest intention was patently clear in the light of evidence that the RM50,000 was later banked in to this account. (para 16)

(3) Based on the totality of the evidence, the only reasonable inference to be drawn was that the respondent knew that the 100 days celebration was organised and sponsored by the State Government and not by PKR and he deliberately concealed the fact from PW14's knowledge. PW14 was induced by the respondent into believing that the donation was meant for the State organised event, when in truth, it was not meant for that purpose. The testimony that the fund for the 100 days celebration was provided by the State Government was not challenged. (paras 24, 25 & 28)

(4) Although PW14 admitted that he did not feel cheated, it did not mean that he was not cheated. PW14's intention was to donate the RM50,000 to Pakatan Rakyat which administered the State Government of Selangor and not to PKR as a political party. It was PW14's unchallenged evidence that if not for P38 and the respondent's oral representation, he would not have given the money. There was also no substance in the respondent's point that PW14 did not make any police report. The absence of police report only goes to the credibility of the victim as a witness and the weight to be given to his evidence. The court's only concern is whether on the evidence presented before it, the charge had been proven beyond reasonable doubt. (paras 37, 38, 40, 41 & 43)

(5) A *prima facie* case had been established against the respondent in respect of the first charge. The respondent's defence was a mere denial which in law did not constitute a valid defence. The denial could not have the

effect of nullifying PW14's testimony that he was induced by the respondent into parting with the RM50,000 due to P38 and his oral representation. The respondent also failed to explain why the RM50,000 was deposited into an account that was opened without the knowledge and approval of the party, *ie*, PKR. Therefore the evidence remained unrebutted and there was clearly fraudulent intention on the part of the respondent to induce PW14 into giving the RM50,000 donation. (paras 44, 61 & 62)

***Bahasa Malaysia** Headnotes*

Responden adalah pegawai dengan tugasan istimewa kepada Menteri Besar Selangor ('MB') pada masa itu dan Ketua Cabang Parti Keadilan Rakyat ('PKR'). Pertuduhan pertama terhadap responden di bawah s. 420 Kanun Keseksaan adalah bahawa, dalam kapasitinya sebagai Pengarah Program merayakan 100 hari Pakatan Rakyat ('keraian 100 hari'), dia dengan memperdaya, mendorong PW14 memberikan sumbangan RM50,000 yang dikatakannya adalah untuk program yang dikelolakan oleh Kerajaan Negeri Selangor. Responden meminta sumbangan tersebut melalui surat ('P38') yang dikatakan telah dihantar salinannya kepada MB dan representasi lisan menyatakan bahawa sumbangan tersebut adalah untuk menanggung kos mengelolakan program tersebut. Berdasarkan surat dan representasi lisan tersebut, PW14 bersetuju menyumbang jumlah tersebut. Jumlah tersebut didepositkan ke dalam akaun PKR Selangor yang dibuka menggunakan satu resolusi yang ditandatangani oleh pemegang jawatan parti PKR. Walau bagaimanapun tiada agenda atau resolusi bagi pembukaan apa-apa akaun bank bagi PKR Selangor dan dengan itu, kesalahan tersebut membentuk perkara pertuduhan di bawah s. 471 Kanun Keseksaan dan boleh dihukum di bawah s. 465 Kanun Keseksaan. Mahkamah Sesyen melepaskan responden daripada pertuduhan pertama selepas pembelaannya dipanggil manakala dia dilepaskan dan dibebaskan daripada pertuduhan kedua tanpa pembelaannya dipanggil. Atas rayuan oleh pihak pendakwaan terhadap kedua-dua keputusan, Mahkamah Tinggi menolak rayuan terhadap pelepasan dan pembebasan berkaitan pertuduhan kedua tetapi membenarkan rayuan terhadap pelepasan berkaitan pertuduhan pertama, di mana responden disabitkan atas pertuduhan tersebut dan dijatuhkan hukuman dua tahun penjara dan dua kali sebatan rotan. Oleh itu, responden merayu hanya terhadap sabitan bagi pertuduhan pertama dan rayuan pihak pembelaan terhadap pertuduhan kedua.

Diputuskan (menolak rayuan terhadap pertuduhan pertama dan mengesahkan sabitan; menolak rayuan terhadap pertuduhan kedua)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Elemen penting kesalahan dalam pertuduhan kedua, iaitu, bahawa responden secara tidak jujur 'menggunakan' dokumen salah sebagai tulen, tidak dibuktikan oleh pihak pendakwaan. Tiada keterangan

bahawa responden adalah orang yang menggunakan dokumen salah untuk melakukan kesalahan tersebut. Paling tidak, kes pendakwaan adalah keraguan semata-mata. Keraguan, tidak kira seberapa teruk pun, tidak boleh menggantikan pembuktian. Oleh itu, kes *prima facie* tidak dibuktikan terhadap responden. Rayuan pendakwaan terhadap pelepasan responden daripada pertuduhan kedua ditolak.

(2) Walaupun tiada keterangan untuk mengaitkan responden secara langsung dengan pembukaan akaun tersebut, tidak diragui bahawa dia terlibat. Responden sememangnya mengetahui kewujudan akaun tersebut kerana dia telah ke bank bersama-sama dengan dua ahli PKR bagi tujuan itu. Niat tidak jujur responden amat jelas berikutan keterangan RM50,000 kemudiannya dimasukkan ke dalam akaun itu.

(3) Berdasarkan keseluruhan keterangan, satu-satunya inferens yang boleh dibuat adalah bahawa responden mengetahui tentang keraian 100 hari dikelolakan dan ditaja oleh Kerajaan Negeri dan bukan oleh PKR dan dia sengaja menyembunyikan fakta tersebut daripada pengetahuan PW14. PW14 didorong oleh responden untuk mempercayai bahawa sumbangannya adalah untuk program yang dikelolakan Negeri, sedangkan pada hakikatnya, ia bukan untuk tujuan tersebut. Keterangan bahawa dana bagi keraian 100 hari diperuntukkan oleh Kerajaan Negeri tidak dicabar.

(4) Walaupun PW14 mengakui bahawa dia tidak merasa ditipu, ia tidak bermaksud bahawa dia tidak ditipu. Niat PW14 adalah untuk menyumbang RM50,000 kepada Pakatan Rakyat yang mentadbir Kerajaan Negeri Selangor dan bukan untuk PKR sebagai parti politik. Keterangan PW14 yang tidak dicabar adalah bahawa jika bukan kerana surat P38 dan representasi lisan responden, dia tidak akan memberikan wang tersebut. Juga tiada kebenaran dalam hujahan responden bahawa PW14 tidak membuat apa-apa laporan polis. Ketiadaan laporan polis hanya menjejaskan kebolehpercayaan mangsa sebagai saksi dan beban yang diberikan kepada keterangannya. Mahkamah hanya mengambil kira sama ada atas keterangan yang dikemukakan di hadapannya, pertuduhan tersebut dibuktikan melampaui keraguan munasabah.

(5) Kes *prima facie* dibuktikan terhadap responden berkaitan dengan pertuduhan pertama. Pembelaan responden adalah penafian semata-mata yang dari segi undang-undang tidak membentuk pembelaan yang sah. Penafian tidak boleh mempunyai kesan membatalkan keterangan PW14 bahawa dia didorong oleh responden untuk kehilangan RM50,000 disebabkan oleh surat P38 dan representasi lisannya. Responden juga gagal menjelaskan mengapa RM50,000 tersebut didepositkan ke dalam akaun yang dibuka tanpa pengetahuan dan kelulusan parti itu, iaitu, PKR. Oleh itu, keterangan tetap tidak dipatahkan dan jelas wujud niat menipu pada pihak responden untuk mendorong PW14 memberikan sumbangan RM50,000.

Case(s) referred to:
AEG Carapiet v. AY Derderian AIR 1961 Cal 359 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Gunasegeran Pavadaisamy v. PP [1997] 3 SLR 969 ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohd Jalani Saliman & Anor v. PP [1998] 1 CLJ 123 HC ***(refd)***
Pasupathy Kanagasaby v. PP [2005] 1 CLJ 442 CA ***(refd)***
PP v. Chin Yoke [1939] 1 LNS 66 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
PP v. Sukumaran Sudram [1999] 4 CLJ 242 HC ***(refd)***
Re Pichi Muthu [1970] 1 LNS 138 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Federal Constitution, art. 145(3)
Penal Code, ss. 415, 420

For the prosecution - Ahmad Sazilee Abdul Khairi (Aida Adhha Abu Bakar with him); DPP
For the respondent - Manjeet Singh Dhillon (Ahmad Nizam Hamid, Mohd Falihin Kamil & Mohd Sazali with him); M/s Sazali & Lim

[Editor's note: Appeal from High Court, Shah Alam; Criminal Appeal No: B42S-188-2011 (affirmed).]

Reported by S Barathi

JUDGMENT

Abdul Rahman Sebli JCA:

[1] The respondent, Mohd Yahya bin Mat Sahri, who is the appellant in the other appeal before us was charged in the Sessions Court at Shah Alam with two offences specified in the following charges:

> First Charge
>
> Bahawa kamu, pada 4 Jun 2008, antara jam 1.00 petang dan 3.00 petang, di Gardenia Coffee House, Hotel Quality, Bangunan Perangsang Shah Alam, di dalam Daerah Petaling, di dalam Negeri Selangor telah menipu Abdul Karim bin Munisar (No. KP: 500608-02-5531) dengan memperdayakan beliau untuk mempercayai bahawa Seketeriat Pakatan Rakyat, yang mana kamu sebagai Pengarah Program Sambutan 100 Hari Pakatan Rakyat memohon sumbangan menampung pembiayaan Majlis Sambutan 100 Hari Pakatan Rakyat, dan dengan itu, kamu telah dengan curangnya mendorong Abdul Karim bin Munisar untuk menyerahkan wang yang berjumlah RM50,000.00 kepada kamu sebagai sumbangan, yang mana Abdul Karim bin Munisar tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan.

Second Charge

Bahawa kamu, pada 14 Mei 2008, di Maybank, Cawangan Bandar Sunway, di dalam Daerah Petaling, dalam Negeri Selangor dengan curangnya telah menggunakan suatu dokumen sebagai tulin iaitu "Resolusi Pembukaan Akaun untuk Parti Keadilan Rakyat Selangor" yang mana kamu ada sebab untuk mempercayai bahawa dokumen tersebut adalah surat pemalsuan dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 471 Kanun Keseksaan, dan boleh dihukum di bawah seksyen 465 Kanun yang sama.

[2] He was acquitted of the first charge after his defence was called whilst for the second charge he was acquitted and discharged without his defence being called. The prosecution appealed to the High Court against both decisions.

[3] Having heard arguments, the learned High Court Judge dismissed the appeal against acquittal and discharge in respect of the second charge but allowed the appeal against acquittal in respect of the first charge, whereupon he proceeded to convict the respondent of the charge and sentenced him to two years imprisonment and two strokes of the rotan.

[4] The penalty for the offence is imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and the offender is also liable to fine.

[5] This is the respondent's appeal against his conviction in respect of the first charge whilst the prosecution's appeal is against the dismissal of their appeal against the order of acquittal in respect of the second charge. The respondent is not appealing against sentence.

[6] We heard arguments on 29 January 2016 and reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment. We shall first deal with the second charge. We are unanimous in finding that both the Sessions Court and the High Court were right in finding that the charge had not been proved against the respondent.

[7] It is clear to us that no *prima facie* case had been established against the respondent in respect of the second charge as an essential element of the offence, ie, that he dishonestly "used" the offending document as genuine had not been proved by the prosecution.

[8] There is no evidence that the respondent was the person who used the offending document in the commission of the offence. The prosecution's case at its highest was a mere suspicion. But suspicion, no matter how grave is no substitute for proof. The prosecution's appeal against his acquittal in respect of the second charge is therefore dismissed.

[9] As for the first charge, the case for the prosecution was that the respondent, in his capacity as the Director of Programme for Pakatan Rakyat's 100 Day celebration had, by deception, induced one Dato' Abdul

Karim bin Munisar into giving him a donation of RM50,000 which he claimed was meant for an event organised by the State Government of Selangor when it was not.

[10] The facts are these. The respondent was an officer with special functions to the then Menteri Besar of Selangor, Tan Sri Abdul Khalid Ibrahim ("Tan Sri Khalid") who gave evidence as PW21. On 4 June 2008, the respondent, who was the "Ketua Cabang" of Parti Keadilan Rakyat ("PKR") Tanjung Karang met the President of Kumpulan Darul Ehsan Berhad ("KDEB") Dato' Abdul Karim bin Munisar (PW14) at the Gardenia Coffee House, Quality Hotel and solicited for donation from him by showing a letter (P38) which contained the following statements or statements to the like effect:

(i) that Pakatan Rakyat Selangor would be organising an event in conjunction with Pakatan Rakyat's 100 days in power after defeating Barisan Nasional in the 12th General Election;

(ii) contribution was needed to cover the cost of the event which was estimated to be RM200,000;

(iii) the event was to take place at the Shah Alam Stadium on 20 June 2008 at 8.30pm;

(iv) the respondent was the director of programme; and

(v) the letter had been copied to Tan Sri Khalid as the PKR State Liaison Chairman.

[11] The clear impression given by the letter was that the donation was to cover the cost of organising the 100 Day celebration organised by Pakatan Rakyat which administered the State Government of Selangor, and that the estimated sum needed for the purpose was RM200,000.

[12] Conspicuously missing in the letter was any sort of indication that the donation was not meant for any political party forming Pakatan Rakyat, namely PKR, PAS and DAP. Also missing was any mention that the 100 Day celebration was to be sponsored by the State Government of Selangor.

[13] On the strength of the letter and the oral representation made by the respondent, PW14 agreed to contribute RM50,000. A cheque for that sum was prepared and issued. The Manager of RHB Bank Section 9 Shah Alam branch, Fadzal bin Mohd Daud (PW18) confirmed that the sum had been debited from KDEB's account No. 21245140066442 and cleared on 17 June 2008.

[14] Elvira bte Rahmat Kishlan (PW22), the Assistant Manager of Maybank Bandar Sunway Branch testified that a cheque in the sum of RM50,000 was deposited into PKR Selangor account No. 562311101881 on 17 June 2008. This account was opened on 13 May 2008 using a resolution

purportedly signed by Syed Hussein bin Ali (PW10) and Salehuddin bin Hashim (PW12). The former was the Deputy President of PKR while the latter was the party's Secretary General. Both denied signing the resolution.

[15] PW10's and PW12's testimony was that at the PKR Supreme Council Meeting held on 4 May 2008, there was no agenda, let alone a resolution for the opening of any bank account for PKR Selangor. Even Tan Sri Khalid himself as PKR Selangor Liaison Chairman was never informed of the account. The account was therefore opened with a dishonest intention and for a dishonest purpose.

[16] Although there is no evidence to link the respondent directly with the opening of the account, there is no doubt that he was involved. He had gone to the bank together with two other PKR members for that purpose. He certainly knew of the existence of the account. His dishonest intention is patently clear in the light of evidence that the RM50,000 was later banked in to this account.

[17] Tan Sri Khalid's testimony was that he never saw the letter at P38 (although it was purportedly copied to him). Nor was he informed by the respondent that he had asked for donation from KDEB for the 100 Day celebration. His Special Officer Hasnah bte Abu Hassan (PW19) likewise testified that she never saw the letter at P38.

[18] Tan Sri Khalid further testified that he never directed anyone to issue the letter at P38 and never instructed anyone to collect any money from anybody for the 100 Day celebration. It is clear that the respondent had acted without the sanction and knowledge of his party PKR in soliciting for donation from PW14.

[19] It was also Tan Sri Khalid's testimony that he was not aware of the existence of any Pakatan Rakyat secretariat for the 100 Day celebration and was never informed of such secretariat by anyone. He said he only knew of the secretariat formed by the State Government. The setting up of a separate secretariat must therefore have been for an ulterior purpose.

[20] The respondent's act of "copying" the letter at P38 to Tan Sri Khalid was obviously intended to convince PW14 that the donation was meant for the 100 Day celebration organised by Pakatan Rakyat (and therefore the State Government) and not by PKR. Tan Sri Khalid's testimony in this regard was that the 100 Day celebration that was held at the Shah Alam Stadium on 20 June 2008 was organised and funded by the State Government and not by PKR.

[21] Dato' Dr Hassan bin Mohamed Ali (PW20) was the Pakatan Rakyat Assemblyman from PAS who chaired the meeting for the 100 Day celebration. The respondent as director of programme was present at the meeting. PW20 testified that at the meeting, there was no proposal for

soliciting donations from any party including State owned companies. PW20 also said he never instructed the respondent or anyone to form a secretariat for the 100 Day celebration.

[22] PW20 further testified that he was not aware of the existence of a separate organising committee for the celebration and neither was he informed by the respondent of the formation of another secretariat as pictured in the letter at P38. It is clear that by mentioning his role in the letter at P38 as director of programme but without mentioning that the donation was meant for PKR, the respondent's intention again was to mislead PW14 into believing that the donation was meant for the State organised event.

[23] The State Government of Selangor, Pakatan Rakyat and PKR are three different entities. The respondent being a senior party member should know this. It will be a long shot to suggest that he did not know the difference.

[24] There was in any event no challenge to PW20's testimony that the fund for the 100 Day celebration was provided by the State Government. In fact it was PW20 himself who presented the paper for approval by the State EXCO. The respondent knew about this, as evidenced by the minutes of meeting at exhs. P21 and P23. He was not only present at the meeting but in fact gave a briefing.

[25] From the totality of the evidence, the only reasonable inference to be drawn is that the respondent knew that the 100 Day celebration was organised and sponsored by the State Government and not by PKR and he deliberately concealed this fact from PW14's knowledge.

[26] It is clear that the respondent had taken advantage of PW14's ignorance of the fact that the 100 Day celebration was organised and funded by the State Government and not by PKR and that no donation was needed to cover the cost of the event.

[27] PW14's testimony was that as far as he was concerned, since the State Government of Selangor was administered by Pakatan Rakyat, the 100 Day celebration was a Pakatan Rakyat programme, ie, a State Government programme and not PKR's programme as a political party. It was in that belief that he agreed to donate the RM50,000.

[28] On the evidence, there can be no doubt that PW14 had been induced by the respondent into believing that the donation was meant for the State organised event, when in truth it was not meant for that purpose.

[29] Of particular relevance to note is that the respondent had represented to PW14 that the donation was meant for the 100 Day celebration organised by Pakatan Rakyat, but the RM50,000 cheque was not deposited into Pakatan Rakyat's bank account. It was deposited into a PKR account that was opened to the respondent's knowledge but not to the knowledge of the party.

[30] The respondent had used the words "Pakatan Rakyat" in the letter at P38 and the date for the celebration was stated to be 20 June 2008. This was intended to coincide with the date of the celebration organised by the Pakatan Rakyat State Government and which was to be held at the Shah Alam Stadium.

[31] This is yet another proof of the respondent's intention to mislead PW14 as the letter omitted to mention that the 100 Day programme was not a programme organised by PKR as a political party. Nor did the respondent tell PW14 so verbally. The intention obviously was to hide his real intention, which was to deposit the RM50,000 into the PKR bank account. This was clearly a dishonest concealment of fact. Explanation 1 to s. 415 of the Penal Code ("the Code") is relevant, which provides as follows:

> Explanation 1 - A dishonest concealment of facts is a deception within the meaning of this section.

[32] In setting the tempo of his argument, learned counsel for the respondent submitted that "If ever there was a malicious prosecution, this was it." He went on to say: "Fate plays its hand in strange ways and this court is today faced with determining a strange tale of a political donation."

[33] The stab of the argument obviously is that the respondent's prosecution was motivated by political consideration rather than for having committed a criminal act, although counsel did not say so in so many words.

[34] Counsel then went on to make some kind of comparison when he said: "And two, in complete contrast and harking to the prevailing state of affairs in the country, of an alleged political donation of RM2,600,000,000 where

(i) the political donation is allegedly given to an individual and credited into his personal account;

(ii) there neither the donor nor the purpose of the donation is disclosed; and

(iii) where the donation is not properly audited.

And yet the MACC in its zeal elects in the first instance to mount a prosecution under s. 420 of the PC for alleged cheating and in the other goes profoundly silent".

[35] We do not know for certain what and who learned counsel was referring to but there is no mistaking the insinuation that since the RM50,000 was a political donation, it was not a criminal offence for the respondent to have solicited and received it from PW14 on behalf of PKR.

[36] To buttress his argument, learned counsel quoted the statement by the Deputy Prime Minister in Parliament on 3 December 2015 as reported in the Hansard where at p. 30 he was recorded to have said:

> Pada masa yang sama, saya juga ingin menjelaskan di sini bahawa dalam system demokrasi, amalan menerima dana politik dibenarkan kepada parti-parti politik termasuk pembangkang. Pada masa ini Malaysia masih

A lagi tidak mempunyai undang-undang yang mengatakan derma or pembiayaan politik perlu diistiharkan dan tidak mengharamkan derma untuk kegunaan politik.

[37] But the simple truth is, this case is not about political donation. It is about cheating, which is a crime under s. 420 of the Code. Learned counsel, B being a senior and seasoned criminal lawyer obviously recognised this for he went on to argue that no offence of cheating had been disclosed because PW14 himself admitted in cross-examination that he did not feel cheated.

[38] With due respect to learned counsel, the argument cannot get more fallacious than that. Of course PW14 did not feel cheated but that is the C hallmark of a successful confidence trickster, to make his victim feel that he was not being cheated. It does not mean that the victim was not cheated. Not feeling cheated and being cheated are two different things altogether.

[39] If PW14 had realised that he was being cheated, yet he went ahead with the donation, then it would be a case of allowing himself to be fooled D by the respondent, which was not the case for the prosecution. The following answer by PW14 in cross-examination is relevant:

S: Sumbangan RM50,000 tidak ada kena mengena dengan kerajaan negeri tetapi untuk program parti?

E J: Sumbangan yang diberi ialah untuk sambutan 100 pakatan rakyat, bagaimana sumbangan itu dibelanjakan ialah terpulang kepada parti.

[40] Clearly, PW14's intention was to donate the RM50,000 to Pakatan Rakyat which administered the State Government of Selangor and not to PKR as a political party. It was PW14's evidence, and this was not F challenged in cross-examination, that if not for the letter at P38 and the respondent's oral representation, he would not have given the RM50,000. What this means is that PW14 was completely taken in by the letter at P38 and by the respondent's sleigh of words.

[41] The respondent through the cross-examination of PW14 had taken G issue with the fact that PW14 did not lodge any police report against him. We do not see anything of substance in the point taken. The court's only concern is whether, on the evidence presented before it, the charge had been proved beyond reasonable doubt.

H **[42]** It is not for the court to question the wisdom of the Public Prosecutor in filing any charge against anyone: art. 145(3) of the Federal Constitution; *Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152.

[43] In any event it cannot be a correct proposition of law to say that where no police report has been lodged by the victim of a crime, no charge can be I sustained against the perpetrator of the crime. The absence of a police report merely goes to the credibility of the victim as a witness and the weight to be given to his evidence. These are matters for the trial court to decide.

[44] By calling upon the appellant to enter his defence on the first charge, the learned Sessions Court Judge must have been satisfied that a *prima facie* case had been established against the respondent. He could not now turn around and say, as he did in his grounds of judgment, that he should not have called for the defence in the first place. That is not how a criminal trial should be conducted. In any case, on the evidence before the court, a *prima facie* case had clearly been established against the respondent in respect of the first charge.

[45] A *prima facie* case is one that can be overthrown only by rebutting evidence adduced by the other side: *PP v. Chin Yoke* [1939] 1 LNS 66; *PP v. Sukumaran Sudram* [1999] 4 CLJ 242; *Balachandran v. PP* [2005] 1 CLJ 85.

[46] By calling for the defence it also means that the learned Sessions Court Judge was satisfied that the witnesses called by the prosecution were credible witnesses and this includes, most importantly PW14 who testified in clear terms that he would not have donated the RM50,000 if not for the letter at P38 and the respondent's oral representation. This evidence can only be overthrown by rebuttal evidence from the respondent.

[47] In *Balachandran (supra)* this is what Augustine Paul JCA (as he then was) said in delivering the judgment of the Federal Court:

> Since the court, in ruling that a *prima facie* case had been made out, must be satisfied that the evidence can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail.

[48] Being the appellant in the appeal in respect of the first charge, the burden is on the respondent to show that the learned High Court Judge was plainly wrong in finding him guilty of the charge. The question is whether the respondent had succeeded in doing so. We are not convinced that he had.

[49] True to his profession as a politician, the respondent could not resist the temptation of adding political flavour to his defence when he said in examination in chief that the purpose of organising the 100 Day celebration by Pakatan Rakyat was, in his own words:

> Untuk melihat dan mengiktiraf kemenangan rakyat, melawan kezaliman kita bergerak mewujudkan iaitu (sic) kerajaan yang lebih adil. Perpaduan Ketiga-tiga parti perlu dilihat dari segi kekuatannya.

[50] When called upon to state his defence to the first charge, the respondent's explanation was essentially as follows:

(i) it was PW14 who suggested to him that a letter asking for donation be put up, meaning to say it was not his idea to put up the letter at P38 but PW14's idea;

(ii) PW14 knew that the donation was meant for PKR and that the suggestion came from PW14 himself;

(iii) PW14 knew the purpose of the donation;

(iv) there was a prior discussion between him and PW14 on the donation and the program for the 100 Day celebration; and

(v) that he had informed Tan Sri Khalid of the letter at P38 asking for donation.

[51] If these assertions were to be disregarded, the respondent's defence to the first charge would fall flat to the ground. There can be no argument that these are very material allegations against PW14 and Tan Sri Khalid, which in fact formed the backbone of the respondent's defence, yet none was put to PW14 and Tan Sri Khalid when they were cross-examined.

[52] The law is settled that such failure raises the inference that it was an afterthought: see *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154 where it was held at p. 167:

> Although in our criminal jurisprudence, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought, or a recent invention as happened in this case.

[53] The point was lucidly explained by Mukharji J in *AEG Carapiet v. AY Derderian* AIR 1961 Cal 359 in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. **It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice**. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (emphasis added)

[54] Similarly in *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 it was held by the Federal Court that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony. See also *Re Pichi Muthu* [1970] 1 LNS 138; [1970] 2 MLJ 143; *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180.

[55] In the context of the present case, the crucial part of PW14's evidence that is deemed to be accepted is his testimony that he would not have given the RM50,000 had he not been misled by the respondent into believing that the donation was meant for an event organised by the State Government, when in fact it was not. We reproduce below the relevant part of PW14's evidence:

> S: Datuk beri sumbangan selepas ditunjuk kepada P38. Boleh kamu sahkan beri sumbangan selepas dirujuk surat ini?
>
> J: Ya.
>
> S: Jika pada ketika itu, OKT tidak tunjuk surat ini adakah kamu akan beri sumbangan?
>
> J: Tidak.

[56] PW14 was steadfast in his evidence that as far as he knew there was no other celebration other than the one organised by the State Government. When asked if there was a separate event organised by PKR in conjunction with the 100 Day celebration, his answer was a categorical "No". Asked if he knew who organised the 100 Day celebration, PW14 said he knew. It was the State Government.

[57] It is clear that PW14 had taken the respondent for his words that the donation was meant for a Pakatan Rakyat event organised by the State Government and not an event organised by the party, PKR. This part of PW14's testimony was also not challenged at all in cross-examination and is therefore deemed to be admitted.

[58] As for Tan Sri Khalid, that part of his evidence that was not challenged and therefore deemed to be admitted is his testimony that he was not informed by the respondent that he (respondent) had asked for donation from KDEB for the 100 Day celebration. Thus no weight should be given to the respondent's assertion in his defence that he did inform Tan Sri Khalid of the letter at P38.

[59] Given the respondent's position as officer with special functions to the Menteri Besar, a position which obviously gave him direct access to the Menteri Besar, it is understandable that PW14 would believe every word that the respondent uttered to him with regard to the purpose of the donation.

[60] The respondent's testimony in examination in chief was long and winding but a close examination will reveal that it was more of a briefing on his role in PKR and in the committee for the 100 Day celebration rather than to effectively rebut the prosecution's case.

[61] It will not be wrong to say that the respondent's defence was nothing beyond mere denial, which in law does not constitute a valid defence: *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 324; *DA Duncan v. PP* [1980] 1 LNS 12; [1980] 2 MLJ 195. Such denial cannot have the effect of

A nullifying PW14's testimony that he was induced by the respondent into parting with the RM50,000 due to the letter at P38 and his oral representation.

[62] Significantly, the respondent failed to explain why the RM50,000 was deposited into an account that was opened without the knowledge and approval of the party, ie, PKR. This evidence therefore remained unrebutted. He claimed that other than the letter at P38, four other similar letters had been sent to other parties but there is no evidence that the letters had been sent to and received by anyone.

[63] Instead of casting doubts in the prosecution's case the respondent had in fact strengthened it when he admitted under cross-examination that at the time he passed the letter at P38 to PW14, he knew that the cost for the 100 Day celebration was to be borne by the State Government.

[64] Cheating is defined in s. 415 of the Code as follows:

> Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

[65] The offence is complete the moment the money is delivered, no matter who would have to bear the loss finally: *Pasupathy Kanagasaby v. PP* [2005] 1 CLJ 442. In *Mohd Jalani Saliman & Anor v. PP* [1998] 1 CLJ 123; [1997] 5 MLJ 551 Abdul Malik Ishak J (as he then was) said:

> There must be deception. That deception must be caused by the accused to generate inducement in the mind of the victim. Deception may be by words or conduct. Deception has an element of misleading. It is inducing a person to believe as true something which is false.

[66] Having regard to the proved facts and what in law constitutes cheating, the learned High Court Judge was absolutely correct in finding that the element of cheating had been established and the learned Sessions Court Judge was absolutely wrong in finding otherwise. There clearly was fraudulent intention on the part of the respondent to induce PW14 into giving the RM50,000 donation: *Gunasegeran Pavadaisamy v. PP* [1997] 3 SLR 969.

[67] In finding that the respondent had cast a reasonable doubt in the prosecution's case and therefore innocent of the first charge, it is clear that the learned Sessions Court Judge was swayed by the following factors:

(i) PW14 did not at any time feel that he was cheated by the respondent;

(ii) it was a fact that two events were organised for the 100 Day celebration, one by the State Government and the other by PKR;

(iii) the accountant who was appointed to prepare the financial report for PKR confirmed that donations were received by the party from individuals as well as private companies for the purpose of the celebration;

(iv) other than the letter at P38, there were other similar letters issued by PKR to private companies asking for donation;

(v) that the RM50,000 donated by PW14 was meant for the party;

(vi) the prosecution failed to answer the question if the respondent would have been charged with the offence if PW14 had instructed for the RM50,000 to be given to Pusat Khidmat Islah; and

(vii) the respondent had no intention to cheat PW14.

[68] We have dealt with issues (i) - (v) and (vii) and will not repeat them. As for issue (vi), we must confess we are unable to comprehend how such failure by the prosecution could cast a reasonable doubt in its case. The fact of the matter is, if in fact PW14 had been cheated by the respondent into parting with the RM50,000, it does not matter to whom he would give the money away.

[69] In point of principle, the learned Sessions Court Judge had erred in failing to state how the respondent's explanation had cast a reasonable doubt in the prosecution's case. There is no set formula for this but the grounds must indicate that he had tested the respondent's explanation against and in the light of the evidence adduced by the prosecution.

[70] As an example, it was the respondent's claim that the RM50,000 that he solicited and obtained from PW14 was meant for PKR. But the prosecution's evidence was that the bank account in which the RM50,000 was deposited was opened without the knowledge and approval of the party.

[71] In view of the material conflict in evidence, the learned Sessions Court Judge's duty was to test the respondent's self-serving claim against and in the light of the evidence already established by the prosecution, but he failed to do so. It is not enough for him to merely conclude at p. 9 of his judgment that the respondent had cast a "keraguan" in the prosecution's case.

[72] The law is trite that to entitle an accused person to the benefit of the doubt, the doubt must be real and reasonable and capable of standing up to reason. It must not be a doubt conjured up to create a difficulty or to confuse the trial judge. This is how the learned Sessions Court Judge dealt with the matter:

> Selepas meneliti keseluruhan kes pembelaan saya berpuas hati bahawa pihak pembelaan telah berjaya mengemukakan bukti-bukti secara document dan keterangan saksi-saksi pembelaan untuk mematahkan kes pihak pendakwaan, dengan lain perkataan telah berjaya menimbulkan

A keraguan dalam kes pendakwaan. Keraguan yang ditimbulkan adalah amat ketara hinggakan saya sendiri mempersoalkan keputusan saya dalam memanggil OKT untuk membela diri.

[73] There is nothing in the above passage to indicate that he had directed his mind to the distinction in criminal jurisprudence between a 'reasonable B doubt' and just 'any doubt'. This is a serious misdirection by way of non-direction.

[74] Perhaps it is necessary for us to reproduce what Lord Denning MR said in the oft-cited case of *Miller v. Minister of Pensions* [1947] 2 All ER 372 in relation to what 'reasonable doubt' means in law. This is what he said:

C

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not D in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[75] Having gone through the evidence and the grounds of judgment of both the learned Sessions Court Judge and the learned High Court Judge carefully, we are satisfied that the learned High Court Judge was right in finding the E respondent guilty of the first charge.

[76] In the circumstances the appeal is dismissed and the respondent's conviction in respect of the first charge is affirmed. Since there is no appeal against sentence, the respondent is to serve his sentence forthwith.

F

G

H

I